SWIFT *v.* TYSON VERSUS GELPCKE *v.* DUBUQUE.

SO much has been written and spoken about the cases of Swift *v.* Tyson,[1] and Gelpcke *v.* Dubuque,[2] that as subjects of legal discussion they may well seem exhausted. The recent publication, however, of various addresses and essays[3] recalling the attention of lawyers to the question of judicial legislation, and especially to the question of the real nature and effect of judicial action in the decision of a case not controlled by statute or precedent, has prompted a consideration of these cases, as related to each other, and as indicative of the position assumed by the Supreme Court of the United States with respect to this long mooted controversy.

The point in dispute is clearly and briefly defined by what may be called a comparison of the pleadings; that is, by contrasting the propositions advanced on either side by the advocates engaged. In the introduction to his Commentaries Blackstone asserts that a judge "is not delegated to pronounce a new law, but to maintain and expound the old one,"[4] and defines the effect of a decision overruled by stating that "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law."[5] The decisions of courts of justice, according to him, are only "the evidence of what is common law,"[6] and "the judge is only to declare and pronounce, not to make and new-model the law."[7] At a time when a comprehensive and systematic view of the principles of the common law was itself a novelty, and the study of the philosophy of the law hardly had a beginning in England, these opinions met the approval of the very

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[1] 16 Peters, 1. [2] 1 Wallace, 175.

[3] Among others the following:—

"Provinces of the Written and Unwritten Law" and "The Ideal and the Actual in the Law." Addresses by Mr. James C. Carter.

Prof. W. G. Hammond's Notes to Blackstone's Commentaries (1890), Vol. I. p. 213 *et seq.*

"Judicial Legislation: Its Legitimate Function in the Development of the Common Law." Mr. E. R. Thayer. 5 HARV. LAW REV. 172.

"Some Definitions and Questions in Jurisprudence." Prof. J. C. Gray. 6 HARV. LAW REV. 21.

[4] Page 70. [5] Page 70. [6] Page 71. [7] Book 3, p. 327.

few who had given any thought at all to the subject, and received the ready acquiescence of the legal profession. Since then they have been often quoted approvingly from the Bench, and if a great preponderance of judicial opinions is to be conclusive of the question, they correctly represent to-day the nature of our unwritten law. The majority of philosophical and non-judicial writers, on the other hand, have regarded Blackstone's conclusions as superficial and unsound. Austin, the best known of these, speaks of "the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges,"[1] and announces his own opinion to be that the *ratio decidendi* (or the ground or principle of a judicial decision which is not merely an application of pre-existing law) is itself a law, or performs the functions of a law.[2] The issue framed by this conflict of opinion can be thus stated: Does a judge, in deciding a case in which he is not directed by statute or bound by judicial precedent, create the law announced by his decision?

It is obvious that an agreed definition of the word "law" in this issue is an indispensable requisite of an intelligent discussion. Indeed the absence of such an agreement will account for much of the difference of opinion upon the main inquiry. Whether law is the command of a sovereign, or exists in the customs of society independently of such command, or is measured and defined by the development of the opinion of the community upon questions of ethics, are abstract questions of legal philosophy of which a universally acceptable solution has yet to be found; and those who have written of judicial legislation have held widely differing views upon them. It seems proper, therefore, before proceeding further, to say that the writer ventures no opinion regarding these questions, and that for the purposes of this article a definition will be assumed, and the word "law" will be used as meaning a rule of conduct enforced by the process of the courts. This is the law with which judges have to deal. The word "legislation" will mean the process by which such a rule is created. That an Act of the legislature is such a process, and that such Acts make but a small part of the rules which it is the duty of courts to enforce, all

[1] Jurisprudence (4th ed.), Vol. II. p. 655.

[2] Jurisprudence, Vol. II. p. 649. In accord, see also Maine's Ancient Law, p. 14; Holland's Jurisprudence, Chap. V. pp. 53, 56; Digby's "History of the Law of Real Property," p. 63; Markby's Elements of Law, p. 61.

will agree. The question whether the remaining part is not made by the courts themselves is the question of judicial legislation with which this article is concerned; and that question, under the definitions assumed, seems to be one of small difficulty. The rules which courts *will* enforce can only be known by the rules which courts *do* enforce, and which are to be found in their decisions. Whatever adds to or subtracts from these rules is legislation. By reason of the importance attached by our system of law to judicial precedent, the decision of a particular case extends its effect to subsequent cases arising upon the same facts, and announces not only a rule for the determination of the case in which it is made, but a general rule for all cases to which it is applicable, — a rule, that is to say, which until it is changed is included in the body of rules enforceable by the courts, and is, therefore, according to the definition, a rule of law. In this narrow view, whenever a judge takes a rule, no matter where he finds it, provided it is not in an Act of the legislature or in the decisions of the courts, and, by enforcing it in a particular case, adds it to the rules which courts will thereafter enforce, he necessarily legislates. That to assume the definitions of law and of legislation begs the whole question of judicial legislation, as commonly discussed, is doubtless true; but to discuss that question is foreign to the present purpose.

In examining the discussions by the courts of the issue thus raised with respect to judicial legislation we are met on the very threshold of our inquiry by the question whether it can ever, in a judicial sense, be decided by the courts; whether, that is, upon any state of facts a court can be compelled to decide it in order to decide the case. Is it anything more than a question of legal and philosophical speculation, and can it in any given case be brought within the boundaries of that law which judges must pronounce in order to do justice between litigants? This is a question not readily or confidently to be answered, yet one which, as the writer thinks, is finally capable of an affirmative reply. In cases calling for the application of the law of a foreign jurisdiction a court may be called upon to decide whether the decisions of the foreign courts are or are not laws. The opinions expressed by judges upon the nature of their own action in particular cases are of necessity mere *obiter dicta*. It is impossible for any state of facts squarely to present to a court the question whether it has itself made law.[1]

[1] The case of Pierce *v.* Pierce, 46 Ind. 86, is interesting in this connection. By the twenty-fifth section of an Act of Indiana of 1852, three-fourths of the property

There are many cases, to be sure, whose decision strongly suggests the question of judicial legislation to all observers, but of these

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of a decedent would have descended to his widow, but by an Act of 1853 that section was amended so as to divide the estate equally between the widow and mother. In Langdon *v.* Applegate, 5 Ind. 327, the Supreme Court decided that amending Acts which failed to recite the amended section in full were unconstitutional. The Act of 1853 fell within that ruling. An administrator, in compliance with that rule, had conducted his distribution according to the Act of 1852, and had ignored the Act of 1853. In Turnpike Co. *v.* The State, 28 Ind. 382, the case of Langdon *v.* Applegate was expressly overruled, and the Act of 1853 declared to be constitutional. The court held the administration invalid, saying: —

"The consequence of the overruling of those cases (Langdon *v.* Applegate, and others to the same effect) was that the statutes which, according to the rulings therein, would have been held unconstitutional, were valid, not from the time of overruling those cases, but from the time of their enactment until they were repealed. It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the State. This court has no power to repeal or abolish statutes. If it shall hold an Act of the Legislature unconstitutional, while its decision remains the Act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly."

In other words, the Statute of 1853 never was unconstitutional, and the decision in Langdon *v.* Applegate never was the law of the State. This is about as near as a court can be brought to deciding whether it has itself legislated or not. Observe, though, that the case does not necessarily call for the opinion delivered. It may well be that the decision of Langdon *v.* Applegate was the law of Indiana until the case of Turnpike Co. *v.* The State, and that the latter decision *changed the law* retroactively, — a power denied to legislatures, but constantly exercised by courts. This seems to have been the view of the Court of Queen's Bench in a similar case, Henderson *v.* Folkestone Waterworks Co., 1 Times Law Rep. 329. There a house owner sued a water company for rates paid by him in excess of what had since been held to be legal by the House of Lords. The defendant pleaded that the payment was voluntary.

"It was," said plaintiff's counsel, "a payment in ignorance of law."

Lord Coleridge: "Of what law? I was ignorant of it before the decision of the House of Lords. I had held the contrary, and two eminent judges agreed with me. Can that be put as ignorance of law?" Later, in giving judgment for the defendant, the Lord Chief Justice said: —

"Here at the time the money was paid, which was before Dobb's case (the House of Lords' decision), *the law was in favor of the company*, and there is no authority to show that it can be recovered back on account of a judicial decision reversing the former understanding of the law."

Since money paid under a mistake of law cannot be recovered in England, the dispute with counsel as to what constitutes a mistake of law had no direct bearing on the case; and the case is further distinguishable from the Indiana decision by the fact that the Queen's Bench is a court of subordinate jurisdiction, whereas in the Indiana case the opposite rulings were both made by the Supreme Court. The interruptions from the Bench show plainly, though, that the mind of the learned judge was not in accord with what the Indiana court had declared to be the status of an overruled decision. According to Pierce *v.* Pierce, the decision of the Lord Chief Justice and his associates, in view of Dobb's case, could certainly be put as ignorance of law.

very few indeed require a ruling upon that question by the judges themselves. Decisions without precedent and decisions by which prior cases are overruled are common instances of the larger class. The former, it is quite plain, cannot present the question of judicial legislation for decision; but in cases which fall under prior rulings of the court the distinction is not so clear, and has been frequently ignored.

In the great majority of cases the record discloses a state of facts covered by a prior decision, upon which one of the parties relies. To follow that decision involves no opinion whatever upon the nature of that decision as respects the question of judicial legislation. That question must in any case be subsidiary to the inquiry, What is the law governing the facts before the court? and that inquiry, as regards the law of the jurisdiction, is closed by the prior decision invoked. The determination of whether or not that decision made the law announced by it, can have no bearing on the case at bar. And so, if the decision is overruled and the law to be applied in similar cases is changed. This is, according to the now commonly received opinion, a very satisfactory example of legislation by judges; but there is no possible occasion for the court to declare itself on the matter. Whether the court is changing the law, or merely correcting an erroneous declaration of it, cannot in any way affect the judgment to be rendered.

Thus, if the question should be raised in the New York Court of Appeals whether a legatee by murdering a testator had invalidated a bequest to him in the will, the court would be bound by Riggs *v.* Palmer[1] to decide that he had. That decision pronounced the law which, unless it is squarely overruled, must govern all subsequent cases involving the same facts. The decision of the case at bar cannot be affected by the question, whether the effect of that case was not the embodiment of an exception in the local statute of wills or an amendment of the provisions of the Penal Code prescribing the punishment for murder. Neither to affirm it nor to overrule it indicates any opinion upon that question. The decision of a case overruling Riggs *v.* Palmer is entirely consistent with either one of two opinions: (1) that Riggs *v.* Palmer never was the law, that is, that the decision of that case did not embody the rule it announced in the law of the state; or, (2) that the law created by that decision is a bad law and shall be changed retro-

[1] 115 N. Y. 506.

actively, so that hereafter facts falling within that ruling shall be governed by the present decision without reference to the time of their occurrence. The decision would be the same, whether Riggs *v.* Palmer was an instance of judicial legislation or not.

Where a court is examining the unwritten law of a foreign jurisdiction the situation appears to be different. The decisions of the foreign courts are neither the laws nor the evidence of the laws of the court. The courts of one State are powerless to make or to declare the laws which shall govern another. There are cases, nevertheless, in which a court is called upon to declare what is the law of another jurisdiction. Such a case, for example, is one in which the parties have agreed to refer their conduct to the standard of a foreign law. To decide the case it is necessary for the court to state what is the foreign law. The court, indeed, has the power to examine and to decide the case on the merits, independently of the foreign law, for it is certain that its decision can never be reversed by the foreign courts; but such a course would be a gross abuse of power, and is, as a matter of fact, rarely resorted to. The decisions of such cases invariably profess to be according to the foreign law agreed upon. Suppose that in such a case a decision in point of the foreign court of last resort is cited. What, if anything, will the decision of the case necessarily affirm of the foreign decision? If it is followed and applied, the court may be declaring either (1) that it is the law of the foreign state, or (2) that it is conclusive evidence of that law. Clearly there is no question of judicial legislation decided here. But how, if it is repudiated and a different rule is applied to the decision of the case? In that event we have seen that in the case of a domestic decision the court may be declaring either (1) that the decision cited never was the law, or (2) that, though it was the law, it is now changed. In the case of a foreign decision the second alternative is absent, for the court has no power to change the foreign law. To repudiate the foreign decision, therefore, necessarily involves the opinion that it is not the law of the foreign state, which is equivalent to saying that the judges who made it did not make it a part of the law of that state, and that they did not legislate. An illustration of such a ruling in practice is provided by the case of Faulkner *v.* Hart[1] in the New York Court of Appeals. The facts, which were submitted to the court in an agreed statement,

[1] 82 N. Y. 413.

were these: The plaintiffs contracted in New York with a transportation company for the carriage of certain goods by that company from New York to Boston, and for delivery to the plaintiffs, who were the consignees. The goods were received by the defendants who were connecting carriers over the latter part of the route, and were residents of Massachusetts. The plaintiffs called for the goods when they arrived at Boston, but a delivery was refused until the next day, as it was not convenient to deliver them. They were unloaded and placed in the defendant's warehouse the same afternoon, but too late for delivery; and during the night the warehouse with the goods was destroyed by fire. The action was to recover the loss. The defendants cited decisions of the Supreme Court of Massachusetts,[1] to show that they were not liable, and it was admitted in the opinion that under those decisions the operators of a railroad, as matter of law, cease to be common carriers and become warehousemen, when the duty of transportation is completed and goods are deposited in a warehouse to await the orders of the consignee. Nevertheless the court reversed the judgment for the defendant affirmed by the general term of the court below, and ordered judgment for the plaintiff in the amount of his claim. If the earliest Massachusetts decision covering the point in issue made the law for that State, the New York court could not refuse to follow it, without flagrantly shirking its duty. If it was no more than evidence of the law, the court was of course at liberty to disregard it in the light of better evidence. The court itself seems to have taken this view, for the opinion concedes that, if there had been a positive statute of Massachusetts providing that a carrier's liability should cease when the goods had been deposited in a suitable warehouse at the end of the route, a different conclusion would have been required. There was no intention on the part of the court to repudiate the law of Massachusetts; the intention was to declare what that law was. This is quite apparent in these concluding sentences of the unanimous opinion delivered by Judge Miller:

"The rule adopted in the Massachusetts cases cannot be sustained. It should not be overlooked that the point presented does not involve solely a question as to a local law, but part of a system of general commercial law. That the court in Massachusetts had decided the law contrary to

[1] Norway Co. *v.* B. & M. R. R. Co., 1 Gray, 263; Rice *v.* Hart, 118 Mass. 201; and others.

what it was is not controlling; for it may be assumed, even if the parties had knowledge of the decision, that they knew it was contrary to the current of authority in similar cases, and contracted, having in view the law as it actually existed. Like an unconstitutional law, void of itself, *the decision was not the law*, and is not to be regarded as authority for that reason."

These observations have been thought proper by way of preface to the present discussion, to define its limits. It is not proposed to consider the cases of Swift *v.* Tyson, and Gelpcke *v.* Dubuque primarily as instances of judicial legislation, but because in the views taken of them by the court it was in each of them necessary to pronounce judicially upon the effect of final decisions in a foreign jurisdiction, and so upon the question of whether or not they were laws. This will appear more clearly after a brief statement of certain elementary propositions respecting the court's jurisdiction.

With the exception of suits between citizens of the same State claiming land under grants from different States, the appellate jurisdiction of the Supreme Court is confined by the Constitution to two classes of suits. Cases may come up from both the inferior Federal courts and from the State courts of last resort because they involve questions arising under the Constitution, treaties, or laws of the United States; and cases of all kinds may come up from the former courts, which have acquired jurisdiction solely by reason of the fact that the parties are citizens of different States. In these two classes of cases the Supreme Court exercises widely different functions. In cases involving Federal questions there can be no doubt whatever of the law to be applied by the court. It is the law of its own government; that is, the law of the United States in the sphere of its sovereignty. The subject-matter of the suits falls under Federal cognizance only; the questions involved arise under laws of the United States which are declared to be the supreme law of the land, and which are foreign and superior to the laws of the quasi-sovereignties of the States which compose the Union. That the laws of the United States should be ultimately construed by the courts of any other government is a proposition not to be seriously considered.[1] In the second class of cases, on the

[1] "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number." Hamilton, The Federalist, No. LXXX.

other hand, the Federal jurisdiction is not exclusive, but concurrent with that exercised by the courts of the States. The subjects of the suits are not matters of Federal control. The law to be administered is not United States, but State law, — the Federal courts, of course, act within their own jurisdiction in one sense; but that jurisdiction only calls for the administration of the law of another government, namely, the State where the controversy arose, or in reference to whose laws the parties have dealt, so that ultimately the law to be applied is the law of a foreign jurisdiction.

It would seem that upon the question of what is the law of a given State the decision of the highest court of that State should be conclusive, whether we regard the decision as being itself the law or merely as evidence of the law, and that the sole duty of the Federal court in the exercise of this peculiar jurisdiction is to discover, if possible, from the precedents and analogies to be found in the decisions of the State courts, a rule covering the case before it, and then to apply that rule. The Federal judges should be as much bound by a State decision upon a question of State law, as a State court is bound by a Supreme Court decision upon a question of Federal law.

Only thus can the purposes of the jurisdiction be fully answered. The best contemporary evidence accessible, read in the light of recognized principles of statutory construction, supports this proposition. Before the adoption of the Constitution, suits between citizens of different States were tried in the State courts, there being no other. The evil felt and feared in this system was the effect of prejudice against suitors who were not citizens, and the remedy sought was the creation of an impartial tribunal to administer the law of the State in which it sat.[1] This was the understanding of Hamilton, who, indeed, regarded this jurisdiction as auxiliary to the constitutional provision that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. "If," he wrote, "it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one

[1] Elliott's Debates, Vol. III. pp. 533, 534, 549, 557, 566.

State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens." [1] The privilege of a citizen of Massachusetts who sues a fellow-citizen is to receive a just application of the law of that State, and, to comply with the Constitution, the privilege of a citizen of Connecticut suing in Massachusetts need be neither more nor less, but the same.[2] It was to secure this end that jurisdiction was conferred upon the Federal courts.[3]

It is worth noting, too, in this connection that since the object of the makers of the Constitution was to put the parties upon terms of equality, an enlargement of the jurisdiction which favors an alien results in an evil of the same degree and character as when a citizen receives the benefit of the court's bias.[4] Moreover, the first Congress, many of whose members had taken part in the framing of the Constitution, passed a law declaratory on the subject, and provided that in the Circuit Courts in trials at common law the laws of the several States should be regarded as rules of decision.[5]

In construing this statute, however, a distinction has been made by the court, and "the laws of the several States" have been held not to include the laws declared by the courts, and to refer only to the laws of the Legislature. That the decisions of State courts construing State constitutions and statutes should control Federal decisions upon the same question seems never to have been doubted by the court before Gelpcke *v.* Dubuque. "The judicial department of every government, where such department exists," wrote Chief Justice Marshall, "is the appropriate organ for con-

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[1] The Federalist, No. LXXX.

[2] The sole object for which jurisdiction of cases between citizens of different States is vested in the courts of the United States is to secure to all the administration of justice upon the same principle upon which it is administered between citizens of the same State." Mr. Justice Johnson, in Polk's Lessee *v.* Wendell, 5 Wheat. 293, 302.

[3] Ibid.

[4] Mr. Geo. W. Pepper has discussed this whole subject very clearly in a little book entitled "The Borderland of State and Federal Decisions."

[5] "The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act of Sept. 24, 1789. § 34; 1 Statutes at Large, 92; Rev. Stat. § 721.

struing the legislative Acts of that government. . . . On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." [1]

In a later case, Shelby *v.* Guy,[2] the Supreme Court, in declaring the meaning to be given to the words "beyond the seas" in a Tennessee statute, said: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as where States have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are."

There is certainly no room in this argument for the distinction which has been taken. It applies with equal force to all the final decisions of State courts. The judicial department of a government is not more appropriately engaged in the exposition of statutes than in the declaration of unwritten law. The latter is in truth its principal business. And the judicial construction of a statute is no more a part of the law of a State than any other decision. It is liable to be overruled, amended, or qualified, in common with other adjudications. The suggestion that a judicial construction makes a part of the statute, is more plausible than sound. If a statute in New York commands that certain instruments shall be sealed, and the Court of Appeals decides that the letters "L. S." on those instruments make a seal, is that decision any more a part of the law of New York than if it had been made in exposition of the common law? It is not literally a part of the statute. To allow to it the efficacy of written law, admits all that is claimed for a common law decision, for few statutes can be interpreted without resorting to the common law for rules of construction and for definitions. Would the same distinction be made to-day in construing the clause of the fourteenth amendment to the Constitution, which

[1] Elmendorf *v.* Taylor, 10 Wheat. 152, 159.

[2] 11 Wheat. 361, 367.

ordains that no State shall deny to any person within its jurisdiction the equal protection of "the laws"? Does this, too, refer only to statutes? Or does it embrace all the rules and regulations, legislative and judicial, which govern the relations of citizens to each other and to the State? It will be interesting to see how far the court will sacrifice to consistency when this question is presented to them.

In individual opinions of members of the court the distinction has, in fact, been more than once abandoned. There is no suggestion of it, for example, in the following dissenting opinion of Mr. Justice Johnson in Daly *v.* James [1]: —

"Upon the question so solemnly pressed upon this court in the argument how far the decision of the Court of Pennsylvania ought to have been considered as obligatory on this court, I would be understood as entertaining the following views: As precedents entitled to the highest respect the decisions of the State courts will always be considered; and in all cases of local law we acknowledge an established and uniform course of decisions of the State courts in the respective States as the law of this court; that is to say, *that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts.*"

In Beauregard *v.* New Orleans,[2] Mr. Justice Campbell said of this jurisdiction: —

"Upon cases like the present, the relation of the courts of the United States to a State is the same as that of its own tribunals. They administer the laws of the State, and to fulfil that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion."

The argument is briefly and forcibly stated in a recent dissenting opinion of Mr. Justice Field in B. & O. R. R. Co. *v.* Baugh,[3] as follows: —

"The theory upon which inferior courts of the United States take jurisdiction within the several States is, when a right is not claimed under the Constitution, laws, or treaties of the United States, that they are bound to enforce as between the parties the law of the State. It was never supposed that upon matters arising within the State any law other than that of the

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[1] 8 Wheat. 495, 542. [2] 18 How. 497, 502. [3] 149 U. S. 368, 403.

State would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the State would be enforced differently by the Federal courts sitting in the State and the State courts; that there would be one law when a suitor went into the State courts, and another law when the suitor went into the Federal courts, in relation to a cause of action arising within the State, — a result which must necessarily follow if the law of the State can be disregarded upon any view which the Federal judges may take of what the law of the State ought to be rather than what it is." [1]

The decisions in such cases, however, particularly those made in the last half century, show plainly that the court does not now assent to this view of its duty, and refuses to regard the decisions of State tribunals as obligatory upon it. To be sure, it may still be said to be the general rule that in determining what is the law of a State the Supreme Court will follow the decisions of its highest court; but this rule is stated as one voluntarily adopted by the court for one reason or another, and not as a duty imposed upon it by the organic law. Thus, in cases involving the title to real property, and in questions of wills, inheritance, and descent, as well as in most cases of statutory construction, it is almost invariably the rule that the local decisions will be given a controlling effect. The reason usually assigned is, in real property cases, that the *lex rei sitae* should govern; and, in the other cases, that great confusion and mischief would result from the adoption of any other rule. The true reason, that the court is administering, not its own, but a foreign law, is no longer advanced.

In two lines of cases of particular importance the Supreme Court refuses to follow this general rule, and applies a law of its own, though if the reason here suggested for the rule be sound, the cases are not distinguishable on principle from those which adhere to the rule. The court has repeatedly announced that in matters of what is variously called "general commercial law," [2] "gen-

[1] The theory of obligation is supported also by the opinions in Dred Scott *v.* Sandford, 19 How. 393. The majority of the court in that case concurred in the opinion of Mr. Justice Nelson that upon the question of the effect of the plaintiff's temporary residence in a free State they were concluded by the decision of the Supreme Court of Missouri.

"Our conclusion therefore is," the opinion reads, "upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it."

[2] Oates *v.* National Bank, 100 U. S. 239; Brooklyn City R. R. Co. *v.* National Bank, 102 U. S. 14.

eral law," [1] "general jurisprudence," [2] and "common law," [3] it will not follow the decisions of the local courts,[4] even though the construction of a statute be involved; and it is equally emphatic in the declaration that it will protect contract rights in all cases where the decision of a court under which they have accrued has been subsequently overruled by that court.[5] Of the first line, the typical and leading case is Swift *v.* Tyson; of the second, Gelpcke *v.* Dubuque.

Swift *v.* Tyson came before the court in 1842 on a certificate of division of opinion from the Circuit Court for the Southern District of New York. It was a suit on a bill of exchange by an indorsee, a citizen of Maine, against the acceptor, a citizen of New York. The defence was fraud and failure of consideration. The answer to a bill of discovery, filed by the defendant, disclosed that the bill had been taken by the plaintiff in satisfaction of a pre-existing debt, and thereupon the question arose on the trial whether the defendant was entitled to give evidence of fraud and failure of consideration against the plaintiff, as if the suit had been between the original parties to the bill, — in other words, was the plaintiff a holder for value? This was the question certified to the Supreme Court. It was argued for the defendant that by the law of New York the satisfaction of a debt in such cases was not a valuable consideration, and that the New York decisions should be conclusive to admit the evidence. The Supreme Court decided that the evidence offered was inadmissible. Mr. Justice Story, in delivering the opinion, reviewed the New York cases, and announced that in the absence of a positive opinion of the Court of Errors on the point, the law of that State could not be regarded as finally established. Here, then, seems to have been a proper opportunity for the Supreme Court to render an independent judgment, there being, one might say, no State law governing the case. Had the learned justice done this, without more, the case would probably have escaped the torrent of hostile criticism that has been directed against it. The opinion, however, went on to assume that it was firmly settled by the law of New York that the

[1] Hough *v.* Railroad Co., 100 U. S. 213, 226.

[2] Railway Co. *v.* Prentice, 147 U. S. 101, 106; Insurance Co. *v.* Broughton, 109 U. S. 121, 126.

[3] Chicago *v.* Robbins, 2 Black, 418.

[4] See the cases collected in the note to Burgess *v.* Seligman, 107 U. S. 20, 34.

[5] In Taylor *v.* Ypsilanti, 105 U. S. 60, 71, this is said to be "no longer open to question in this court."

plaintiff had given no consideration, and then declared that the Supreme Court was under no obligation to apply that law.[1] The defendant had urged that the case was controlled by the thirty-fourth section of the Judiciary Act, providing that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply; and there was no answer to this, except to say that the law of a State is not to be found in the decisions of its courts. The question of judicial legislation, as already defined, was therefore plainly involved. The opinion met the issue without evasion, and adopted the old fiction without hesitation.

"It will hardly be contended," it said, "that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, wherever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. . . . We have not now the slightest difficulty in holding that this section upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

This decision is the origin of the anomalous doctrine of the general commercial law, now firmly established in the jurisprudence of the United States. Few defend it now on any ground but that of expediency, and the decisions which apply it admit by a fair implication that its title to respect rests chiefly on prescription.[2] Certainly it is difficult to define the position of the general

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[1] This doctrine is now established by many decisions. See the cases reviewed in Mr. Justice Brewer's opinion in B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368.

In Watson *v.* Tarpley, 18 How. 517, the court, in deference to the general commercial law, refused to apply a statute of Mississippi prescribing the time when the payee or indorsee of a bill of exchange, upon refusal to accept by the drawee, can sue the drawer. The opinion, curiously enough, was delivered by that most determined upholder of State rights, Mr. Justice Daniel.

[2] B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368. Mr. Justice Field in that case expresses his repentance that he ever assented to the doctrine of Swift *v.* Tyson, and declares his faith (p. 403) that "this, like other errors, will in the end die among its worshippers."

commercial law before this case. In what sense was it "general"? If by this is meant that it was the law in a great majority of jurisdictions professing to be governed by the same law, it was none the less not the law of New York, as declared by the authority established finally to determine that law. If it means that it was the law of the United States, as distinguished from the several States, the authority to pronounce and enforce it must be found in the Constitution, and the Constitution makes no reference to the subject. What was really done by Swift *v.* Tyson was to provide an unusually clear example of the very truth which the opinion denied. It created for commercial cases a common law of the United States. Before that, the existence of such a thing had often been denied.[1] The rule of the case is law now, because the United States government through its courts and marshals will enforce it. It was not law before that case, however commendable to reason, because there was no government or authority to enforce it.

For our present purpose it is to be noted that on the admission made in the opinion as to the law of New York, the case was one which squarely raised the question whether or not the decisions of courts are laws, that is, whether or not judges make law, and that the court answered it in the negative, rating the decisions of courts even below local customs in this respect. To this opinion the court has since clung, if one may judge solely by what it has said on the subject. Let us now see if it has uniformly acted upon it.

Gelpcke *v.* Dubuque required a construction of certain sections of the Constitution and of a statute of the State of Iowa. The Supreme Court of that State prior to 1859 had rendered a series of decisions[2] upholding the right of the Legislature to authorize municipal corporations to subscribe for the bonds of railroad companies whose lines extended beyond the corporate limits. In 1859 the court, though conceding that bonds issued under such laws were valid in the hands of innocent purchasers, decided by a narrow majority to restrain a proposed issue.[3] In 1862 the turn about was completed by a unanimous decision squarely overruling

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[1] Tucker's Blackstone, Vol. I. Appendix, 422–433; Wheaton *v.* Peters, 8 Pet. 591, 658.

[2] Dubuque Co. *v.* Pacific R. R. Co., 4 Greene, 1; The State *v.* Bissel, 4 Greene, 328; Clapp *v.* Cedar Co., 5 Iowa, 15; Ring *v.* Johnson Co., 6 Iowa, 265; State *v.* Johnson Co., 10 Iowa, 157.

[3] Stokes *v.* County of Scott, 10 Iowa, 166.

the prior cases, and holding that the Legislature was forbidden by the Constitution to grant such an authority.[1]

Meantime, in July, 1857, the city of Dubuque, acting under legislative authority, issued certain coupon bonds in payment for stock of the Dubuque Western Railroad Company. The bonds were payable to bearer in New York. Default was made in the payment of interest, and the plaintiffs, who were holders for value, sued the city on the overdue coupons in the United States District Court for the District of Iowa, then sitting as a Circuit Court. The defence was that the law authorizing the bonds was unconstitutional. To the alleged conflict between the law and the Constitution the plaintiffs demurred. The demurrer was overruled and judgment entered for the defendants, whereupon the plaintiffs sued out a writ of error to the Supreme Court of the United States, which reversed the judgment and sent the case back for trial.

The case turned wholly upon the question of legislative power, and it was urged for the city that inasmuch as this question had been decided adversely to the power by the Supreme Court of Iowa, it only remained for the Supreme Court of the United States to apply the undoubted law of the State and to affirm the judgment. This view of their duty, however, was not acceptable to the court, and all the judges, except Mr. Justice Miller, who vigorously dissented, concurred in the feeble and impertinent[2] opinion delivered by Mr. Justice Swayne, who advanced as the court's reasons for disregarding the Iowa decision (1) that the law could not be considered settled, since the Supreme Court of Iowa had once changed its mind and might do so again; and (2) that if it were settled, it could only apply in future, and was harmless to invalidate contracts made before its declaration. "The sound and true rule is," the opinion quoted from Ohio Life and Trust Co. *v.* Debolt,[3] "that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and

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1 The State *v.* County of Wapello, 13 Iowa, 388.

2 "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." 1 Wallace, 206.

3 16 How. 416, 432. This case came to the Supreme Court by writ of error to the Supreme Court of Ohio, and the Federal question involved was whether the obligation of a contract was impaired by an Act of the Legislature of that State. The existence of a contract in the case was held to be a question for the independent judgment of the Supreme Court. The opinion of Mr. Chief Justice Taney had therefore no application at all to Gelpcke *v.* Dubuque.

obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." [1]

It is a sufficient answer to the first reason that the Supreme Court of Iowa was fully competent to reverse its own decisions, if so inclined, and that the law upon any subject cannot be said to be unsettled because it may have passed through changes. The second reason is what has made the opinion memorable, and that which concerns the present discussion. To abide firmly by Swift *v.* Tyson the court should have considered neither local ruling as law, but only as evidence of the law. The earlier decisions, when declared to be false evidence, lost all effect, and became as if they had never existed, and contracts based upon faith in them had no legal foundation whatever, and were entitled to no protection from any tribunal. The duty of the Federal court, assuming it not to be bound by the decision of the Iowa court, would then have been to examine the question on its merits and to deliver an independent judgment on the validity of the statute relied upon. This, however, is precisely what the court did *not* do. It gave no consideration to the relative merits of the contradictory Iowa decisions, but announced that the earlier cases would be followed because they had induced contracts in good faith. "However," said the opinion, "we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." This is language for a statute, not for a judicial decision, which, according to the doctrine of Swift *v.* Tyson, declares not only what the law is and shall be, but what it was. Indeed, so far as the opinion is to be regarded as evidence, the judges in the majority, if they were not consciously exceeding their lawful authority,[2] acted under the impression that they were exercising the jurisdiction given to them by the Constitution to protect contracts. "The rule of Ohio Life and Trust Co. *v.* Debolt," it is said, "embraces this case." The principle of that case "applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. . . . To hold otherwise would be as unjust as to hold

[1] The rule of Gelpcke *v.* Dubuque has been often affirmed. Green County *v.* Conners, 109 U. S. 105; County of Ralls *v.* Douglass, 105 U. S. 728, 732; Olcott *v.* Supervisors, 16 Wall. 678; Taylor *v.* Ypsilanti, 105 U. S. 60, 71; Cooley's Const. Lims. 474, 477 (4th ed.); Dillon's Mun. Corp. § 46.

[2] "It is the settled rule of this court in such cases to follow the decisions of the State courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases." 1 Wallace, 206.

that rights acquired under a statute may be lost by its repeal." This conclusion is strengthened by the expressions of the court in cases expressly based upon Gelpcke *v.* Dubuque. In Township of Pine Grove *v.* Talcott,[1] for example, the court said: —

"The national Constitution forbids the State to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."

So, too, in Douglass *v.* County of Pike,[2] Chief Justice Waite said: —

"The new decisions would be binding in all respects as to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligations of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. . . . The true rule is, to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive."

Upon this ground, that it presented a Federal question of the impairment of the obligation of a contract, some writers have supported the case. Mr. Conrad Reno[3] and Mr. William B. Hornblower[4] both appear to regard this as the true and sufficient basis of the decision, and in this opinion they are in evident accord, as has been shown, with the judges who made it. That an extension of the Federal jurisdiction to the protection of contracts from judge-made law as well as from statutes, would be legislation in the interest of justice and fair dealing, is readily admitted; but the great obstacle in the way of supporting the decision on this view is that the Iowa decision, which, it is claimed, impaired the obligation of a contract, was not in any proper sense before the court. The writ of error was directed to the United States District Court, not to the Supreme Court of Iowa. The litigation in the former court was between Gelpcke and the city of Dubuque, in the latter between the State, on the relation of a domestic corporation, and the County of Wapello. The Supreme Court decision cannot therefore be regarded as a reversal of the decision of the Iowa

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[1] 19 Wall. 666. [2] 101 U. S. 677.

[3] "Impairment of Contracts by Change of Judicial Opinion." 23 Am. Law Rev. 190.

[4] "Conflict between Federal and State Decisions." 14 Am. Law Rev. 211, 216.

court. Furthermore, if we examine the Constitution from the point of view of those who framed it, it is plain that in declaring "no State shall pass a law impairing the obligation of contracts," it could not have been intended to include the decision of a court under the term "law." The mischief at which the prohibition was aimed had not been felt in the courts, but in the legislatures.[1] The language of the clause, too, forbids such an interpretation. Even the most thorough-going disciple of Austin would hesitate to speak of a court's "passing" a law, and the statesmen and lawyers of a century ago were still under the spell of the fiction that all decisions are merely declaratory. A decisive test of this view is a writ of error directed to the Supreme Court of a State on the ground that its decision has impaired the obligation of a contract. According to Mr. Justice Swayne and the writers mentioned, such a writ should be supported, there being no distinction in the prohibition between legislative and judicial acts. Mr. Reno, indeed, cites cases[2] to show that such a writ has been sustained; but they will not bear investigation. In each of them it was a statute, as construed by the court, which was averred to violate the Constitution. The question of construction was not open to review, and the only question raised was whether the statute, bearing the meaning fixed by the Supreme Court of the State, was forbidden by the Constitution. The position of the Supreme Court with respect to the State decisions was this: —

We must take your law to be correctly interpreted by your own courts, and if, so interpreted, it impairs the obligation of a contract, it is our duty to set it aside. This is a very different thing from reversing a decision of the Supreme Court of a State, because it impairs the obligation of a contract. If in Gelpcke *v.* Dubuque the statute had threatened innocently acquired contract rights, the case would be analogous to those cited by Mr. Reno. Instead of this, the contract sued upon in that case had no other foundation but the statute. At the present time this question is no longer open, for in New Orleans Waterworks Co. *v.* Louisiana Sugar Co.,[3] the court has decided that such a writ of error will not lie. It is the unanimous opinion of the court, as delivered by Mr. Justice Gray, that: —

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[1] The Federalist, No. XLIV.

[2] Life Ins. Co. *v.* Debolt, 16 How. 416; Boyd *v.* Alabama, 94 U. S. 645; Wright *v.* Nagle, 101 U. S. 794; Louisiana *v.* Pillsbury, 105 U. S. 278, 294–295.

[3] 125 U. S. 18, 30.

"In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts." [1]

Another writer has found means to support the decision without calling to his aid the supposed Federal question. Professor James B. Thayer has given his approval to the principle of Gelpcke *v.* Dubuque as "a rule of administration" to be followed by the Federal courts.[2] He points out that to require the Federal courts to follow the State decisions in every case would defeat the purpose of the jurisdiction, since, if the law of the State and Federal courts were the same in all cases without exception, the effect of prejudice against non-residents would be equally operative in both tribunals. That some rule of administration is necessary to attain the end of the jurisdiction may be conceded, as it appears to the writer, without accepting either his definition of the rule or his conception of the cases in which it should be applied. "If," he says, "the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, and *which came within a reasonable interpretation of the State constitution and law*, will be sustained in the United States courts, I think it is a sound one and should be upheld." The application of the rule he would confine to classes of cases where the State courts are likely to be under a local bias. But just here appears to be the real difficulty. Where a local bias has affected the decision of the State court, it is undoubtedly the duty of the Federal court to examine the issue independently of the State decision, to inquire, in effect, whether the law of the State has not been changed for the purposes of a particular case and to the prejudice of a citizen of another State. The object of the jurisdiction, it must be remembered, is to secure the same law for an alien that would be applied in the case of a citizen. But the rule announced in Gelpcke *v.* Dubuque ignores this object, and declares, as qualified by Pro-

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[1] Mr. Justice Miller had already formed this opinion before his dissent in Gelpcke *v.* Dubuque. In Knox *v.* Exchange Bank, 12 Wall. 379, 383, he said:—

"It must be the Constitution or statute of the State which impairs the obligation of a contract, or the case does not come within our jurisdiction." His opinion in Railroad Co. *v.* Rock, 4 Wall. 181, is to the same effect.

[2] Gelpcke *v.* Dubuque, 4 HARV. LAW REV. 311.

fessor Thayer, that, provided the ruling of the first decision is permissible or within reason, it will be followed, whether it be right or wrong.

This is more than the occasion calls for. Why there should be such a rule of law for contracts brought in this way before the Federal courts, more than for any other contracts, it is not easy to see. Professor Thayer's careful limitation of the rule to this peculiar jurisdiction seems a tacit admission that the rule cannot be defended as a principle of general jurisprudence. Why is such a principle any more applicable to the decisions of State courts than to those of the Supreme Court itself?

In Hepburn *v.* Griswold,[1] the court declared the Legal Tender Act invalid as applied to contracts made before its passage, and in Knox *v.* Lee[2] this decision was overruled and the Act was held constitutional. Is the latter decision to be held inapplicable to the case of a party who purchased a money obligation after the former had been rendered, and presumably upon the faith of it? To answer affirmatively illustrates the danger of introducing the practice of considering prior decisions otherwise than upon their merits, and the confusion in the law which would result were such decisions to be judged according to the positions assumed by parties in reliance upon them. The burden of showing the necessity of such a practice in the jurisdiction now under examination rests upon him who affirms it.

In overruling Hepburn *v.* Griswold, the court exercised a power which in Gelpcke *v.* Dubuque it denied to the Supreme Court of Iowa. Why should a retroactive decision to the prejudice of contracts made on the faith of a prior decision be bad in the one case and good in the other? The Supreme Court itself would doubtless repudiate the suggestion that the rule is one of general application in contract cases. How does the object of the Federal courts' jurisdiction in cases where the parties are citizens of different States require such a rule? Has it any connection with that jurisdiction unless the constitutional prohibition is invoked and the analogy of a retroactive legislative act is applied?

Inasmuch as the general rule is confessedly to follow the last State decision, it would seem that, without the suggestion of any principle to distinguish the cases affected by local prejudice, the argument which makes such a course exceptional is fairly open to

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[1] 8 Wall. 603.

[2] 12 Wall. 457.

suspicion. Granting that the case is one to which the general rule is not applicable, what need is there for any rule of administration beyond those provided by the principles of law which the facts involve? The necessity for a special rule of administration extends only to a demarcation of the cases in which the last State decision should not be followed, and the inquiry properly should be, not whether the first and overruled decision is permissible, but whether the last decision, changing the law, can reasonably be upheld. If not, a fair presumption is afforded that the law was made for the particular case and to the special prejudice of an alien. In such a case the Federal court may well say: To follow this decision would defeat the end of our jurisdiction, and we refuse to do so. The question of permissible interpretation, the writer suggests with all deference, appears to be misplaced, and should be directed not to the decision in view of which the contract was made, but to the decision overruling it. The Supreme Court of a State has the undoubted right to overrule its own decisions, that is, to change the law of the State; and except in the one case of a decision against an alien so palpably contrary to reason as to afford a presumption that the court was influenced by local prejudice, it is the duty of the Federal court in applying the law of the State to follow the State court and to acquiesce in the change. Such a rule would introduce no new and hitherto unsuspected principle into the law of contracts, and would abundantly answer the purpose of the jurisdiction.

The object of discussing these different views of the case has been to show that the decision in Gelpcke *v.* Dubuque cannot be supported without an appeal to the now discredited Federal question. This appeal the judges who decided that case had no hesitation in making, and, having made it, they declared that the decision of a court of final resort was the law, — was, in fact, precisely equivalent to a statute, and fell equally within the constitutional prohibition.

The result of comparing these famous cases in their bearing upon the extent of legislative power to be attributed to the decisions of courts, if the above reasoning is not unsound, is to perplex the student with an unavoidable, though unintentional, contradiction in the decisions of the Supreme Court. The many decisions upon the authority of Swift *v.* Tyson declare that the decisions of courts of justice do not make the law, whereas the cases that follow Gelpcke *v.* Dubuque as confidently assert the con-

trary. Not the least curious feature of this inconsistency is that it should be illustrated in cases in which the court enlarged its own jurisdiction by decisions having all the legislative quality and more than the potency of an Act of Congress. This usurpation of a jurisdiction not given by the Constitution has been the subject of much comment. The conflict of opinion indicated upon the question of judicial legislation seems not less worthy the attention of those interested in the philosophy of our law and the study of its primary elements.

William H. Rand, Jr.